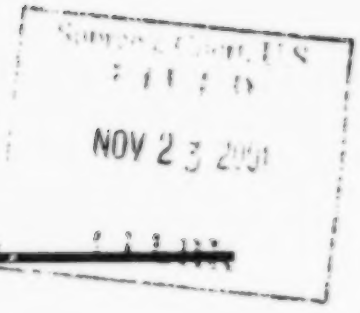

(5)

No. 00-836

IN THE

Supreme Court of the United States

GEORGE W. BUSH,

Petitioner,

v.

PALM BEACH COUNTY CANVASSING BOARD, *ET AL.*,

Respondents.

Response of Katherine Harris, Florida Secretary of State,
Katherine Harris, Laurence C. Roberts, and Bob Crawford,
as Members of the Florida Elections Canvassing Commission,
to Petition for Writ of Certiorari

Deborah K. Kearney
General Counsel
Kerrey Carpenter
Assistant General Counsel
Florida Department of State
PL-02 The Capital
Tallahassee, FL 32399-0250
850.414.5536

Bill L. Bryant, Jr.
Katz, Kutter, Haggler, Alderman
Bryant & Yon, P.A.
Highpoint Center, 12th Floor
106 East College Avenue
Tallahassee, FL 32301
850.224.9634

Joseph P. Klock, Jr.
Counsel of Record
John W. Little, III
J.B. Murray
Arthur R. Lewis, Jr.
Gabriel E. Nieto
Steel Hector & Davis, LLP
200 S. Biscayne Blvd.
Suite 4000
Miami, FL 33131-2938
305.577.7000

2600

RESPONSE OF KATHERINE HARRIS, FLORIDA SECRETARY OF STATE, KATHERINE HARRIS, LAURENCE C. ROBERTS, AND BOB CRAWFORD, AS MEMBERS OF THE FLORIDA ELECTIONS CANVASSING COMMISSION, TO PETITION FOR WRIT OF CERTIORARI

I.

STATEMENT OF THE CASE AND FACTS AND PROCEDURAL HISTORY

The Secretary of state of Florida (the "Secretary") and the Florida Elections Canvassing Commission (the "Commission")[1] are respondents in this action since they were parties below. In presenting its response, the Secretary and the Commission are focused on Florida's election law as it stood prior to November 21, 2000 (the "Pre-Decision Period"), and how it now stands (the "Post-Decision Period"). November 21, 2000, is the date that the Supreme Court of Florida handed down the decision Petitioners urge this Court to review. *Palm Beach Canvassing Board v. Katherine Harris, et al.*, Case Nos. SC 00-2346, SC 00-2347, and SC 00-2348 (Fla. filed Nov. 21, 2000). Florida's Election Code is set forth at chapters 97 through 106, Florida Statutes.[2] The central

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1. The Commission is composed of the Governor, the Secretary of State, and the Director of the Division of Elections. In this case, Florida's governor recused himself from the certification process and Florida's Commissioner of Agriculture, Bob Crawford, was appointed to fill the vacancy.

2. The Election Code is divided by chapter as follows: ch. 97 ("Qualifications and Registration of Electors"); ch. 98 ("Registration Office, officers, and Procedures"); ch. 99 ("Candidates, Campaign Expenses, and Contesting Elections"); ch. 100 ("General, Primary, Special, Bond, and Referendum Elections"); ch. 101 ("Voting Methods and Procedure"); ch. 102 ("Conducting Elections and Ascertaining the Results"); ch. 103 ("Presidential Electors; Political Parties; Executive Committees and Members"); ch. 104 ("Election Code: Violations; Penalties")' ch. 105 ("Nonpartisan Elections"); and ch. 106 ("Campaign Financing").

focus of this case deals with Chapter 102, which is entitled "Conducting Elections and Ascertaining the Results."

The Secretary is an independently elected constitutional officer within Florida's scheme of an independently elected executive cabinet, composed of a secretary of state, attorney general, treasurer, comptroller and commissioners of Agriculture and Education. The Secretary is also the state's chief elections officer. *See* Fla. Const., art. IV, § 4(b); Fla. Stat. § 97.012. As such, the Secretary is charged with, among other duties, the responsibility to "[o]btain and maintain uniformity in the application, operation, and interpretation of the election laws." Fla. Stat. § 97.012(1). The Secretary is also obligated, through the Division of Elections, to "provide advisory opinions when requested by any supervisor of elections . . . relating to any provisions or possible violations of Florida election laws with respect to actions such supervisor . . . has taken or proposes to take." Fla. Stat. § 106.23(2). "The opinion, until amended or revoked, shall be binding on any person or organization who sought the opinion . . . ." *Id.*

After the polls close on an election day, two separate periods come into play: (1) the pre-certification protest period (the "Protest Period") (Fla. Stat. § 102.166); and (2) the post-certification contest period (the "Contest Period") (Fla. Stat. §

102.168). The Protest Period commences immediately upon conclusion of the election and concludes when the last county canvassing board certifies its returns. Once that occurs, the Commission certifies the election returns on two separate dates. The first date is seven days after the conclusion of the election, when each county canvassing board is required to report its final returns to the Division of Elections.[3] Three days later, on the tenth day after the elections have concluded, a supplemental filing is made by the county canvassing boards which adds the overseas absentee ballots that have been received by midnight on the tenth day. The combined returns are then certified by the Commission and become the final official returns. Once the combined returns have been received, the Commission certifies the election and declares the winners, after which the Contest Period commences.

Usually, there is no specific end to the Contest Period,[4] as there has been times in Florida when a contest resulted in the removal and substitution of an officer, already years into a term, at the conclusion of a Contest. The Contest Period for any presidential election must, however, be completed six days before the meeting of the state electors, which in this case is December 18, 2000. *See* 3 U.S.C. § 5 (1997). Thus, for the general elections of 2000, the Protest Period began at the time the polls closed at 8 p.m. on November 7 and ended at 5 p.m. on November 14, a period of seven days. The Contest Period was to commence at 5:01 p.m. on November 14, and was to end at midnight on December 12, 2000, or 29 days.

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3. This year all county canvassing boards certified their returns by 5 p.m. on November 14, within the seven day statutory period prescribed by Fla Stat. § 102.11 (2000).

4. A contest must be initiated within 10 days when the last county canvassing board certifies its returns to the state. Fla. Stat. § 102.168(2).

As noted, after the conclusion of an election, any voter or candidate can file a Protest claiming that the election returns are erroneous (Fla Stat. § 102.166(1)). Procedures are set forth for the review of elections by paper ballots, voting machines, and "electronic or electromechanical equipment." There is a provision for manual recounts, but only the candidate or a political party can request such a review. Fla. Stat. § 102.166 (4)(a). The individual voter has no right to ask for a manual recount.[5]

County returns (with the exception of the overseas ballots) were due to the Department of State by 5 p.m. of the seventh day following the election or they would be ignored. *See id.*[6] Before final certification by the county canvassing board for any particular county, the candidates, their political parties or a political committee that supports or opposes an issue that appeared on the

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5. Based upon the plain statutory language and legislative history, the Secretary and the Commission here maintained that manual recounts are only intended to be used when some type of machine or electromagnetic process is involved. App. at 1a.

6. In 1989, the Florida legislature amended the Election Code by adding section 101.112 (directed to county canvassing boards) which states, in pertinent part, the general rule set forth above regarding the seven-day deadline, but adds that "[i]f the returns are not received by the department by the time specified, such returns may be ignored and the results on file at that time may be certified by the department." *See id.*, § 102.112(1). The amendment also provided a $200 a day fine to be levied against the canvassing board members personally for late returns. *See id.*, § 102.112(2). This was done at the same time as the amendments to section 102.166, Florida Statutes, in response to the machine voting problems that occurred in the Mackay-Mack U.S. Senate race in 1988. *See infra* at 11-12, n.10.

ballot were permitted to file a written request with the county canvassing board for a manual recount. *See id.*, §102.166(4)(a) & (b). If the county canvassing board authorizes the manual recount, the recount must include "at least three precincts and at least 1 percent of the total votes cast for such candidate or issue." *See id.*, § 102.166(4)(c) & (d). If the initial manual recount indicates "an error in the vote tabulation which could affect the outcome of the election," the board could: (a) correct the error and recount the remaining precincts with the vote tabulation system; (b) request the department of state to verify the vote tabulation software; or (c) manually recount all ballots.

On November 7, 2000, voters across the nation cast their ballots for, among other offices, President and Vice President of the United States. In Florida, the initial returns from all the counties showed statewide that Governor George W. Bush was slightly ahead of Vice President Albert Gore, Jr. Because the difference was less one-half of one percent, an automatic statewide recount was conducted by all counties the following day. *See id.*, § 102.141(4). After the recount, Governor Bush maintained a narrow lead over the Vice President. On November 9, the Florida Democratic Executive Committee requested manual recounts in the following counties: Volusia, Palm Beach, Broward and Miami-Dade.

On November 13, 2000, the Palm Beach Canvassing Board ("Palm Beach") requested, in writing, that the Division issue a written opinion as to whether the Department of State or the Commission had the discretion to extend the seven-day statutory filing deadline for election returns. By separate cover, Palm Beach also requested that the Division issue a written opinion as to when a county could authorize a manual recount of ballots.

Later that day, in response to a specific request from election officials, the Division issued two formal advisory opinions. *See* Fla. Stat. § 106.23. In response to the first request from Palm Beach, the Division issued Opinion DE 00-10 (App. at 1a) advising Palm Beach that election results not certified by 5 p.m. Tuesday, November 14 could not be counted in the certification of the statewide results. In response to the second request from Palm Beach, the Division issued Opinion DE 00-13 (App. at 2a) advising Palm Beach that the "error in tabulation" language in the statute that serves as the legal basis for a manual recount means "a counting error in which the vote tabulation system fails to count properly marked marksense or properly punched punchcard ballots." App. at 1a-2a.

Also on November 13, the Secretary notified all 67 county elections supervisors that the statutory deadline of 5 p.m. Tuesday, November 14 would not be extended. The Secretary further informed these parties that returns (other than overseas ballots) not filed by the deadline would not be included in the certification of statewide results.

The following day, in response to the requests from Palm Beach County officials, Florida's Attorney General, Bob Butterworth, issued a conflicting opinion, Opinion 00-65, advising Palm Beach that the "error in tabulation" means "a discrepancy between the number of votes determined by a voter tabulation system and the number of votes determined by a manual count of a sampling of precincts pursuant to section 102.166(4), Florida Statutes." App. at 3a.

Volusia County had previously filed a lawsuit in Leon County, seeking to enjoin the Secretary and the Commission from certifying

election results without including returns filed after the seven-day statutory deadline. The Palm Beach County Canvassing Board, Vice President Gore and the Florida Democratic Party ("Democrats") intervened. After an initial hearing, Leon County Circuit Court Judge Terry P. Lewis directed the Secretary "to withhold determination as to whether or not to ignore late filed returns, if any, from Plaintiff Canvassing Boards, until due consideration of all relevant facts and circumstances consistent with the sound exercise of discretion." Bush App. at 50a.

The Secretary's first action in response to the order was to develop a set of evaluative criteria that would be used to decide whether to allow a late filing. First, a set of factors that could justify a late filing was developed. The existence of one or more of these factors, which were drawn from Florida elections case law, could have justified an allowance of late-filing. These factors (and their supporting case law) were:

- Whether there is any indication of voter fraud that could affect the outcome of the election. *In re: Protest of Election Returns*, 707 So. 2d 1170, 1172 (Fla. 3d DCA 1998); *Broward County Canvassing Board v. Hogan*, 607 So. 2d 508, 509 (Fla. 4th DCA 1992).

- Whether there was substantial noncompliance with statutory election procedures, causing reasonable doubt to exist as to whether the certified results express the will of the electorate. *Beckstrom v. Volusia County Canvassing Board*, 707 So. 2d 720 (Fla. 1998)

- Whether election officials had made a good faith effort to comply with the statutory deadline, but were prevented from doing so by an act of god or similar circumstance beyond their control.

The Secretary next determined, again based on a review of the pertinent case law, that the following election irregularities would not constitute a sufficient reason for violating the statutory deadline:

- Noncompliance with statutory election procedures and/or voter error, where there is a reasonable expectation that the results express the will of the voters. *Beckstrom*, 707 So. 2d at 725.
- The use of a ballot design that was confusing to some voters because of the location and alignment of candidates names, so long as a reasonable voter could make his or her choice by exercising reasonable time and study. *Nelson v. Robinson*, 301 So. 2d 508, 511 (Fla. 2d DCA 1974).
- Any other situation that presented "nothing more than a mere possibility that the outcome of the election would have been [a]ffected." *Hogan*, 607 So. 2d 508, 510 (Fl. 4th DCA 1992).

As before, the Secretary's decision was based primarily on reported election cases, which found similar circumstances to be insufficient to justify interference with certified election results. The factors applied thus reflected the law of Florida existing before the Supreme Court of Florida's November 21 decision. App. at 16a.

Thereafter, in accordance with Judge Lewis' order, the Secretary distributed a memorandum to all of Florida's 67 counties

requesting that they provide a written statement, including the facts and circumstances that would justify any late filed returns by 2 p.m. Wednesday, November 15. App. at 8a.

On Wednesday, November 15, the canvassing boards for Palm Beach County, Broward County, Miami-Dade County, and Collier County, responded to the Secretary's memorandum, each providing the facts and circumstances that they believed would provide justifications for the Secretary waiving or extending the statutory deadline to permit later changes to their already filed returns. After carefully reviewing each request in light of pre-established criteria based on long-standing Florida law, the Secretary made a determination that none of the facts before her justified a waiver or extension of the deadline. The Secretary and the Division both consistently took the position that voter error was not a basis for initiating a manual count nor to extend the seven day statutory deadline to do so. Volusia County completed its manual hand count before the 5 p.m. deadline on November 14, and those results were included in Volusia County's timely return.[7]

The Commission certified the timely-filed November 14, 2000, election results for all but the overseas ballots. The certification reflects 2,910,492 votes for Governor George W. Bush and Secretary Dick Cheney and 2,910,192 for Vice President Albert Gore, Jr. and Senator Joe Lieberman.

On November 16, the Democrats filed an Emergency Motion to Compel Compliance with and for Enforcement of Injunction ("Emergency Motion"), and asserted that the Secretary

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7. Neither the Secretary nor the Division are permitted to go beyond the local canvassing board's certification. *See* Fla. Stat. § 102.31.

acted arbitrarily and in contempt of Judge Lewis' order by refusing to accept the returns filed after the statutory deadline.

On November 17, Judge Lewis denied the Emergency Motion, ruling that the Secretary had not acted arbitrarily, and that she "exercised her reasoned judgment to determine what relevant factors and criteria should be considered, applied them to the facts and circumstances pertinent to the individual counties involved, and made her decision." Bush App. at 43a. Later that day, the Supreme Court of Florida *sua sponte* entered an order enjoining the Secretary and Commission from finally certifying the results of the November 7 election and declaring a winner in Florida until further order. Bush App. at 39a.

On November 21, 2000, the Supreme Court of Florida reversed Judge Lewis, holding that manual recounts were not limited to instances of machine error, and that the Secretary had abused her discretion in not accepting returns that were not filed within the seven-day deadline set by the legislature. In short, the Court enlarged the statutory Protest Period from seven days to 19 days, and shortened the Contest Period from 29 days to 16 days. The Court's holding changed the law in the state of Florida as it existed and was applied before November 7, 2000.

II.

THE FLORIDA ELECTION CODE PRIOR TO AND AFTER THE SUPREME COURT OF FLORIDA'S DECISION BELOW

Before the evening of November 21, 2000, when the Supreme Court of Florida issued the decision below, Florida's Election Code provided long-standing procedures requiring the reporting of results by specified deadlines, for dealing with errors in vote tabulation, conducting manual recounts in certain limited circumstances involving mechanical or software failure in mechanical voting equipment, certifying electronic results and allowing affected voters to contest the results of an election. In addition, there was a system that accorded much less time to the Protest Period than it did to the Contest Period.

Under the Election Code as it previously existed, any affected voter, political party or candidate could protest election returns before certification of the election results. Fla. Stat. § 102.166(1). In the event of such a protest, the local elections canvassing board had to follow specific procedures to verify the accuracy of the returns. The procedures to be followed varied depending on whether paper ballots designed for hand counting, voting machines, or machine tabulated paper ballots were used. Fla. Stat. § 102.166(3).

As part of section 102.166, only a candidate or political party is also permitted to file a written request with the local canvassing board for a manual recount. Fla. Stat. § 102.166(4)(a). Provided the request was timely, the canvassing board was given discretion as to whether to conduct a manual recount, after conducting a proper, statutorily-defined, test of certain precincts to determine if there was a mechanical or software problem. Fla. Stat. § 102.166(4)(c). The Protest Period had to be completed, and the election results certified to the Florida Secretary of State within seven days of the election. Fla. Stat. § 102.111(1). Immediately

upon such certification, the Commission was required to certify the elections results.[8] *Id.*

The conclusion of this seven-day protest and certification process triggered the right of any affected voter, taxpayer, as well as an unsuccessful candidate or party, to file an elections contest. Fla. Stat. § 102.168(1). Unlike the pre-certification protest procedure, the Contest Period allows for a full evidentiary record to be introduced, and all facts and circumstances surrounding the election to be examined in the courts. Fla. Stat. § 102.168. Further, an election contest allows for a single venue in the circuit court serving the state capitol for lawsuits stemming from a statewide election, Fla. Stat. § 102.1685, and grants broad authority to the court to fashion appropriate relief. *See id.*, at 102.168(8). The Florida Legislature imposed no specific time limitations on a judicial elections contest, but imposed strict time limits on Protests and recounts that precede a certification, which is the prerequisite to a Contest.[9]

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8. Florida law contemplated that the winner of the election would be declared on the seventh day following the election. Fla. Stat. § 102.111. For federal offices, however, a winner cannot be declared until three days later. That is, however, not a matter of state law. A consent decree between the state of Florida and the United States requires Florida to count absentee ballots from citizens living outside the United States that are received up to 10 days following the election. The consent decree was entered into following the enactment of the seven-day certification provisions in the Florida Election Code.

9. The Florida Legislature's intent to have the protest completed within seven days is exemplified by the fact that it imposed strict financial penalties on local canvassing board members who failed to submit timely returns and required the Commission to ignore any counties that fail to file returns within seven days and certify the election results based solely on

In response to a Protest, Florida law, as it existed prior to November 21, allowed manual recounting to be conducted only in certain limited circumstances. Fla. Stat. § 102.166(5). Both the plain language and legislative history of Florida's election statutes indicate that a manual recount of the ballots in a county was proper only where there has been a failure of the vote tabulation system or as required by a circuit court exercising jurisdiction in a properly filed elections contest action.[10] Failure

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those returns that are timely filed. Fla. Stat. § 102.112(1)

10. The provisions of section 102.166, Florida Statutes, at issue were enacted by the Florida Legislature in 1989 in response to concerns about computer failure in elections and the use of unreliable software to tabulate votes. Ch. 89-348, § 15 Laws of Florida. These concerns had been raised in the 1988 race for the United States Senate between Buddy MacKay and Connie Mack and in subsequent news articles. The legislature enacted sections 102.166(4)-(10), Florida Statutes, to address these concerns as part of what was called the "Voter Protection Act." The Senate Staff Analysis and Economic Impact statement for the Voter Protection Act noted:

> An incident of mechanical problems with an electronic voting system occurred in Bradenton, Florida where a seventh of the county's precincts had to be counted twice in one election since the ballots were soggy, became warped and were mangled by the voting equipment. Also, an apparent software "glitch" or error was responsible for an incident in Ft. Pierce when a machine would count the Democratic votes, but would not accept Republican ones.
>
> Other horror stories related to electronic voting systems have been reported on in the media, but in testimony

of certain voters to properly execute their ballots was not a basis for conducting a manual recount, although this issue could be raised in a post-certification elections contest.[11] App. at 1a-2a.

> before the Joint Committee on Information Technology Resources in 1989, supervisors of elections pointed out that there can be problems with any kind of voting system. However, many local election officials would agree that state certification procedures and local logic - and - accuracy tests provide a reasonable assurance that "electronic" elections are honestly counted. It is generally agreed that additional steps could be taken in Florida to improve security procedures, while not hampering the already cumbersome elections process. would enhance public confidence in our voting system.

App. at 10a (emphasis added).

As this legislative history indicates, the statute was intended to provide an alternate recounting procedure to be used in situations in which mechanical or computer problems caused tabulation equipment to fail to function as intended. The legislature never intended for manual recounts to be used to evaluate ambiguous ballots that *voters* failed to properly execute. Consistent with the legislative intent the Division of Elections formal advisory opinion left open the possibility of a full manual recount, but precluded a recount to assign votes to candidates based on improperly executed ballots that cannot be read by properly operating tabulation equipment.

11. The Division Opinion is an administrative interpretation of the statutes within its subject matter jurisdiction and is binding on subordinate agencies such as the Board. This opinion "remains binding until properly amended or revoked by the Division itself, or invalidated by a court having jurisdiction of the matter." *Smith v. Crawford*, 645 So. 2d 513, 521 (Fla. 1st DCA 1994); *see also Krivanek v. Take Back Tampa*

Florida has never recognized a common-law right to protest election results, much less to require manual recounting of machine ballots. Prior to November 21, the right to a manual recount existed only to the extent provided by the Legislature. Florida Statutes section 102.166(5) allowed such a recount *only* when there had been an "error in vote tabulation." This term had consistently been interpreted, prior to November 21, to mean a failure of the tabulation equipment to count properly executed ballots.[12] App. at

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Political Committee, 625 So. 2d 840, 844 (Fla. 1993). In contrast, the Board was *not* bound to adhere to the Attorney General's opinion. In fact, it was questionable whether the Attorney General even had the authority to issue an opinion on an election issue, given the specific allocation of this function to the Division of Elections in section 106.23(2).

12. In the weeks before the November 7, 2000, general election, each registered voter in Florida was provided with a sample ballot and detailed instructions on how to vote according to the method used in his or her precinct. Additionally, a copy of the instructions was placed prominently in each voting booth. *See* Fla. Stat. § 101.46. In those districts using punch cards, the instructions explained how a voter was to select and punch out the appropriate chad on the ballot. App. at 14a. The instructions included this specific direction:

> **AFTER VOTING, CHECK YOUR BALLOT CARD TO BE SURE YOUR VOTING SELECTIONS ARE CLEARLY AND CLEANLY PUNCHED AND THERE ARE NO CHIPS LEFT HANGING ON THE BACK OF THE CARD.**

Id. When voters followed the instructions, including the removal of any loose chips left attached to their ballots, the automatic tabulation accurately tabulated the ballots. There is no contention otherwise. Only

1a-2a. Thus, when voters failed to mark ballots correctly, there had been no failure in their tabulation under Florida law, and no manual recount was authorized. *Id.*

The Florida Supreme Court's November 21 decision has made a number of changes in Florida's election laws, setting aside some provisions, and implementing others. It has also recognized equitable principals that take precedence over statutory provisions and the exercise of discretion by the Secretary.

First, the requirement that tabulation of election results be completed within seven days has been eliminated. In its place there is a new, judicially-created time limitation that allows at least 19 days to complete the Protest Period before certification, and possibly more when an election protest and request for manual recount have been filed. Bush App. at 38a. Local canvassing board members are now under no duty to comply with the strict time limitations that previously existed and can no longer be fined or have their returns ignored for failing to file certified returns. *Id.*

Second, local canvassing boards may now file amended returns after the statutory deadline, even if they had properly filed returns before the deadline. *Id.* The Secretary of State now has no discretion to reject any such amendment, unless it is so late that it will preclude a candidate or voter from contesting the election or jeopardize the ability of the state to appoint presidential electors within the time limitations of federal law. Bush App. at 37a. Before the November 21 decision, there was no provision in Florida

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the ballots of those voters who, by their own actions, failed to clearly indicate their elective choices, as directed, would be affected by the manual recount at issue.

statutory law that allowed returns to be amended, much less amended after the statutory time limitation for final certification and declaration of the winner has passed. There was also no statutory provision that required the Secretary of State to accept late-filed returns, or limited late filing specifically to situations where the federal time limitations jeopardize Florida's electoral votes. Indeed the existing Florida law required just the opposite: "If the county returns are not received by the Department of State by 5 p.m. of the seventh day following an election, all missing counties shall be ignored, and the results shown by the returns on the file shall be certified."[13] Fla. Stat. § 102.111(1). Late returns, if they would affect the outcome of the election, could be added only if ordered by a circuit court in an election contest action. Fla. Stat. § 102.168(3)(e) and (8). Before November 21, this statute was consistently interpreted to require submittal of returns within seven days. *See Chappel v. Martinez*, 536 So. 2d 1007, 1009 (Fla. 1984)

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13. This statute governs the Elections Canvassing Commission and sets forth its duties with respect to acceptance of election returns and certification of election results. A related provision, which governs local canvassing boards, states that "[r]eturns must be filed by 5 p.m. on the 7th day following the . . . general election," and puts those boards on notice that "[i]f the returns are not received by the department by the time specified, such returns may be ignored and the results on file at that time may be certified by the department." Fla. Stat. § 102.112(1). While this provision may grant the Secretary of State some discretion in deciding whether to accept late returns. The construction by the Supreme Court of Florida to absolutely require late returns to be accepted or to authorize the post-deadline amendment of returns already filed is clearly a change in what might otherwise be understood from reading the provision, even in connection with section 102.112, Florida Statutes.

(requiring substantial compliance with the deadline and holding that telephone transmittal before the deadline sufficed).

Third, the Florida Elections Canvassing Commission is now precluded from certifying election results on the seventh day following the election, as previously required under Florida Statutes sections 102.111, 102.121 and 102.131. Indeed, even where certified returns were filed by all counties within the time limitations that existed before the November 21 decision, the Commission must now wait at least until November 26 to certify the results of the election.

Fourth, the time frame for an elections contest, the only procedure available to individual voters to challenge the outcome of the election, is now drastically shorter. Under the prior law, the period for filing a contest would have begun with the final certification of results on November 17, and the contest proceeding could have extend until December 12, the federal deadline for appointment of presidential electors. Now, any contest cannot begin until the recounts are completed and the results certified. At the earliest, this will not occur until November 26, cutting the contest period from 25 days – already an extremely short period in which to develop a case conduct discovery, have a trial, and pursue any subsequent appeals – to a mere 15 days.

Finally, but perhaps most importantly, manual recounting may now be used in a significantly broader way than previously available. Prior to November 21, in the absence of a judicial decree rendered in an election contest action, manual recounting was allowed only in the case of mechanical, software or other similar failure in the automated vote tabulation and were considered dehors the common law. The Supreme Court of Florida has now recognized

that these rights are equitably required and grounded in Florida constitutional law.

Under Florida Statutes section 102.166(5) a manual recount was a last-resort remedy to be used in areas with automated tabulation systems only when there was no way to mechanically tabulate the ballots. When a sample manual recount indicated a problem with the vote tabulation system, the local canvassing board first attempted to correct the error and recount the remaining precincts with the system under subsection (5)(a). If the error could not be corrected, a board was allowed request the Department of State to verify the tabulation system under subsection (5)(b). Finally, if the system could not be corrected or verified to work properly, then as a last resort, the board would have manually recounted the ballots under subsection (5)(c). There was never any indication that Florida Statutes section 102.166(5) allowed voter errors caused by improperly marked or punched ballots to be selectively corrected. The statute was enacted to provide a remedy when a vote tabulation system failed to read properly marked ballots, not to provide local canvassing boards the unbridled discretion to choose the method of tabulating votes on an *ad hoc* basis after an election was completed.

As a result of the Supreme Court of Florida's decision, the Secretary, the Commission and Florida's 67 local elections canvassing boards will now treat the election certification process quite differently than they would have previously:

- Where the Secretary would have previously rejected late filed election returns, she is now required to accept those returns, so long as the late filing does not violate the judicially created test of being "so late that their inclusion will preclude a candidate from contesting the certification or preclude Florida's

voters from participating fully in the federal electoral process."

- Where the Elections Canvassing Commission would have certified the statewide election on November 17 on the certified returns filed by all of Florida's 67 counties, the Commission must now wait on the results of manual recounts conducted in selected areas, delaying final certification until at least November 26 that must include amendments to the November 14 filing other than overseas ballots.

- Where local canvassing boards were previously precluded from conducting manual recounts in the absence of an error in the vote tabulation system, they now will conduct recounts in almost any circumstance;

- Where each local canvassing board would have submitted only one final set of returns, the local canvassing boards may now conduct a series of recounts and amend their prior certification for some time after the deadline to certify has passed; and

- Where a uniform system of automated counting was previously in place, Florida's votes, including votes for the electoral college, will now be decided based on standards developed by individual local canvassing boards in selected areas of the state.

Dated this 24th day of November, 2000.

Respectfully submitted,

Deborah K. Kearney
General Counsel
Kerrey Carpenter
Assistant General Counsel

Joseph P. Klock, Jr.
Counsel of Record
John W. Little, III
J.B. Murray

Florida Department of State
PL-02 The Capital
Tallahassee, FL 32399-0250
850.414.5536

Bill L. Bryant, Jr.
Katz, Kutter, Haggler, Alderman
Bryant & Yon, P.A.
Highpoint Center, 12th Floor
106 East College Avenue
Tallahassee, FL 32301
850.224.9634

Arthur R. Lewis, Jr.
Gabriel E. Nieto
Steel Hector & Davis, LLP
200 S. Biscayne Blvd.
Suite 4000
Miami, FL 33131-2938
305.577.7000

BY: _____
Joseph P. Klock, Jr.
Counsel of Record

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